Supreme Court, U.S.
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No. 04-851

IN THE

Supreme Court of the United States

AQUAMAR S.A.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the forthcoming decision in *Bates v. Dow Agrosciences*, *cert. granted* 124 S. Ct. 2903 (June 28, 2004)(No.03-388), require reversal of the decision below, which held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") (7 U.S.C. § 136v) preempts a negligent distribution claim by a foreign plaintiff against an exporter of a toxic fungicide?

If the answer to the first question is "no," either because *Bates v. Dow Agrosciences* does not address exported products, or for any other reason. . . .

2. Does the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136v) preempt a claim for damages arising out of the export and *foreign* negligent distribution of a toxic fungicide?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Aquamar S.A., the sole surviving corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Appendix B — Order Of The District Court Of Appeal Of The State Of Florida, Fourth District Denying Petition For Rehearing Dated August 30, 2004 ..... 14a

Aquamar, S.A. petitions for a writ of certiorari to review the decision of the Florida Fourth District Court of Appeal, the highest state court from which a decision may be had on the federal issue presented in this case. That court construed the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v, to completely preempt a state law negligent distribution verdict and judgment against Du Pont, the manufacturer of Benlate, a toxic fungicide distributed in Ecuador, where the damage and injury occurred. Guidance is needed to answer the important environmental regulation issues and to define the interplay between state law claims and federal law under FIFRA.

OPINIONS BELOW

The decision of the Florida Fourth District Court of Appeal is reported at *E.I. DuPont De Nemours and Co. v. Aquamar, S.A.*, 881 So. 2d 1 (Fla. 4th DCA 2004). It is reprinted in the Appendix at App. A, 1a-13a.

STATEMENT OF JURISDICTION

The opinion of the Florida Fourth District Court of Appeal was issued on March 31, 2004 (App. A, 1a-13a) and rendered on August 30, 2004, when a timely motion for rehearing and rehearing *en banc* was denied. App. B, 14a-15a. No basis for Florida Supreme Court review of the dispositive federal issue exists under Florida law. *See* Art. V, § 3(b), Fla. Const.; Rule 9.030(a), Fla. R. App. P.[1]

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1. *See Bunkley v. State*, 882 So.2d 890, 908 (Fla. 2004) (Wells, J., concurring): ("The district courts of appeal are, in most instances, courts of last resort, *Johns v. Wainwright*, 253 So.2d 873 (Fla.1971). . . ."); *accord, Martin v. State*, 747 So.2d 386, 390 (Cont'd)

The decision below reversed a jury verdict and judgment in favor of petitioner and remanded for entry of final judgment in favor of respondent Du Pont. App. A, 12a. On November 12, 2004, Justice Kennedy granted an application for an extension of time within which to file this petition, until December 20, 2004. (Application No. 04A403). Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 136v (The Federal Insecticide, Fungicide, and Rodenticide Act)

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * *

(Cont'd)

(Fla. 2000) ("Since the 1980 constitutional revisions . . . the district courts now constitute the courts of last resort for the vast majority of litigants. *See In re Amendments to Fla. Rules of Appellate Procedure*, 609 So.2d 516, 526 (Fla.1992)").

STATEMENT

1. The Underlying Facts

The respondent, E.I. Du Pont de Nemours and Company ("Du Pont"), manufactures Benlate, a fungicide. Starting in the late 1980's / early 1990's, Benlate (and other fungicides) were widely sprayed on banana farms in Ecuador, in increasing amounts over time, to prevent a banana disease called Black Sigatoka. Petitioner Aquamar, S.A., is an Ecuadorian shrimp farm surrounded by thousands of acres of banana farms, drawing its water from the estuary system of the nearby Guayas River. In 1992, Aquamar (and other Ecuadorian shrimp farmers) began to experience massive shrimp die-offs. This was economically devasting to the shrimp industry, which is Ecuador's third-highest export after oil and bananas.

A scientific workgroup was convened, and concluded in 1994 that the banana fungicides were the likely cause of the shrimp mortality. In 1998, Aquamar filed a negligence suit against Du Pont in circuit court in Broward County, Florida, seeking to establish that the water runoff from the banana farms into the river estuary had killed the shrimp, either directly by causing a shrimp disease known as Taura Syndrome, or indirectly by weakening the shrimp's immune system, making them more susceptible to the disease.[2] Although Du Pont admitted that Benlate was toxic to shrimp, it disputed that Benlate was to blame for Aquamar's losses,

2. Over twenty-five other lawsuits by Ecuadorian shrimp-farmer plaintiffs are pending against Du Pont in Broward County circuit court. A preemption defense has been raised by Du Pont in each of those cases, which are being held in abeyance pending a final decision in this case.

contending that a Taura Syndrome Virus killed the shrimp. Although there was extensive and conflicting expert testimony about the etiology of the shrimp mortality, Aquamar established at trial (relevant to its negligent distribution claim) that DuPont issued technical bulletins and its employees gave banana growers advice about how to use Benlate alone and in conjunction with other manufacturers' fungicide products, including how to rotate and mix Benlate with two other manufacturers' banana fungicides. Farmers who applied Benlate to their crops, in the same ecosystem as Aquamar's shrimp farm, also relied upon the Fungicide Resistance Action Committee, an organization responsible for providing information to Ecuador and major banana producers on pesticide use, and in which DuPont representatives took a leadership role.

In its Answer to Aquamar's Complaint, Du Pont raised the defense of federal preemption by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v. FIFRA is a comprehensive federal statute that regulates the use, sale and labeling of pesticides, and contains an express preemption provision. *See* 7 U.S.C. § 136v(b) (States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter"). At trial, Du Pont argued that the "failure to warn" aspect of Aquamar's negligence claim was either foreclosed by the pleadings, or, if properly pled, preempted by FIFRA.

The trial court rejected the FIFRA preemption defense, and submitted the negligence claim to the jury in a special interrogatory verdict form presenting failure to warn, negligent testing, and negligent distribution as separate theories of liability. The jury rejected the failure to warn and

negligent testing theories, but found that Du Pont was negligent in its distribution of Benlate, awarding damages to Aquamar in excess of $12 million.

Du Pont appealed, asserting, *inter alia*, that Aquamar's negligent distribution claim was a disguised labeling claim, and therefore preempted by FIFRA. *See* App. A, p. 9a. Aquamar's position was that FIFRA does not bar a suit in Florida state court for the negligent distribution of an *exported* toxic fungicide, because FIFRA only preempts label-based causes of action arising out of the sale, use, and labeling of pesticides within the United States, and this negligent distribution claim was *not* label-based and was outside the statutory language pertaining to State regulation of pesticides "in the State. . . ." *See* 7 U.S.C. § 136v(a).

2. The Decision Below Finding FIFRA Preemption

Contrary to the jury's explicit rejection of a failure-to-warn theory of liability in favor of a negligent distribution verdict, the Florida District Court of Appeal found that "Aquamar's negligent distribution claim is, at its heart, a claim challenging the product's label and the failure to warn. As such, FIFRA preempts the state law claim." App. A, 11a.

In reaching that conclusion, the court first reviewed the domestic and foreign regulation of pesticides contained in FIFRA. App. 4a-5a. The statute contains an express preemption clause in § 136v(a, b) (giving a state limited power to regulate the sale or use of any federally registered pesticide "in the State," and precluding any "labeling or packaging" requirements that are "in addition to or different from" federal requirements), and the Court noted (and it is not disputed by Aquamar) that the statutory language has

been interpreted to prohibit a common law cause of action resting on an alleged failure to warn or labeling deficiencies. App. 6a. Although no decision cited by the parties or the Court involved exported products, the Court concluded that the preemption clause applied to claims arising in Ecuador:

> Here, the trial court concluded that FIFRA and its preemption provision were inapplicable because the plaintiff's claims arose from use of the pesticide in Ecuador. This was error.

App. 6a.

That conclusion rested on the fact that the court viewed negligent distribution as a labeling claim, and that exported pesticides, while exempt from domestic registration requirements under FIFRA, are nevertheless required to be "labeled accurately and include certain information. *See* 136o(a)(1)-(2)." *Id.* The court found it "significant" that "FIFRA mandates that a pesticide intended for export may not be 'misbranded." *Id.* (*citing* § 136(p)-(q)). From the statutory meaning of "misbranded," the Court gleaned "Congress's intent to regulate the 'labeling' of dangerous pesticides produced in the United States, but exported to foreign markets." App. 7a.

The court below rejected petitioner's argument that the preemption clause in § 136v, limiting a State's ability to regulate "the sale or use of any federally registered pesticide . . . *in the State*. . . ." (emphasis supplied), was inapplicable to an Ecuadorian plaintiff's claim for the *foreign* use of a pesticide. App. 7a-8a. The court held that because petitioner's claim was brought in state court and under Florida law, "FIFRA governs the product's label and prohibits the State

of Florida from imposing any additional or different requirements" regardless of where the claim arose. App. 8a.

Thus, petitioner's judgment against DuPont was reversed.

REASONS FOR GRANTING THE PETITION

A. A Pending Case, *Bates v. Dow Agrosciences*, May Dictate Whether or Not the State Court's FIFRA Preemption Decision Is a Correct Statement of Federal Law

In *Dow Agrosciences LLC v. Bates,* 332 F.3d 323 (5th Cir. 2003), *cert. granted, Bates v. Dow Agrosciences LLC*, 542 U.S. __, 124 S. Ct. 2903 (June 28, 2004) (No. 03-388), the Fifth Circuit affirmed a declaratory judgment brought by Dow against peanut farmers allegedly injured by a Dow peanut pesticide, holding that "the farmers' claims for breach of warranty, fraud, DTPA [Deceptive Trade Practices Act], defective design and negligence [negligent testing, manufacture and production] are all preempted by FIFRA's express preemption clause because success on such claims would necessarily induce Dow to alter its product label." 332 F.3d at 333. The farmers' petition for certiorari in *Bates*, which has been granted, presents this question:

> Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-137?

Although *Bates* did not address a negligent distribution claim specifically – the type of claim in this case – this Court's answer to the question presented in *Bates* will likely answer or inform the answer to the question presented here.

The court below in this case concluded that petitioner's negligent distribution claim brought in Florida court under Florida law for foreign shrimp crop injuries caused by Benlate, a fungicide exported to and distributed in Ecuador, was preempted by FIFRA. Thus, the court reversed the judgment against the manufacturer, respondent DuPont. *See* App. A, 1a-13a. The court did so without citation to any decision from any jurisdiction in which the claim against the fungicide manufacturer was negligent *distribution*, based on a company's oral and written advice on the use of the product, as opposed to a label-based warning claim. While acknowledging that the regulation of exported products is different than for domestically used fungicides (App. A, 5a-7a), the preemption decision below was unsupported by any decision involving preemption of a claim by a foreign plaintiff based on injuries caused by an exported product.

It is apparent that the Court's forthcoming decision in *Bates v. Dow Agrosciences* will be highly relevant to the issues presented here. Consequently, the Court should hold this case pending a decision in *Bates* and, depending upon the outcome of *Bates*, should grant certiorari in this case, vacate the decision below, and remand for reconsideration in light of *Bates*, or in the alternative, grant certiorari and direct briefing to decide the questions presented here.

B. Whether FIFRA Preemption Applies to a Negligent Distribution Claim Arising from the Foreign Distribution of a Fungicide is an Important and Unanswered Question of Federal Law, Which Should be Addressed Even if *Bates v. Dow Agrosciences* is Affirmed

In *Bates v. Dow Agrosciences*, the Fifth Circuit recognized that FIFRA preemption is not complete preemption:

> Our decisions reveal three clear principles. First, *FIFRA does not completely preempt all state or local regulation* of pesticides. Second, *FIFRA does not preempt common law that is unconcerned with herbicide labeling*, nor does it preempt those state laws concerned with herbicide labeling that do not impose any requirement in addition to or different from the FIFRA requirements. Finally, FIFRA preempts state laws that either directly or indirectly impose different *labeling* requirements.

332 F.3d at 329 (emphasis supplied) (internal citations omitted). The door to a non-preemption conclusion is left open, particularly for a negligent *distribution* claim based on a manufacturer's representations and advice to the users of the product, which is conduct separate and apart from labeling and packaging. That door is open even wider for a foreign plaintiff's claim concerning an exported product, because the federal government's interest in regulating the foreign use of pesticides is minimal, compared to products utilized domestically. *See* Pesticide Export Policy, 58 Fed. Reg. 9062, 9064 (1993) ("The EPA's regulatory decisions are based upon risk/benefit evaluations specific to the United

States. The risk/benefit balance in other countries may differ from the United States due to the differences in . . . public health and environmental considerations").

No court – except the court below – has held that FIFRA preempts a suit in a state court based on negligent distribution of a pesticide or fungicide in a foreign country. The decision below, transforming the jury's negligent distribution finding into a failure to warn labeling verdict (a theory that was explicitly rejected by the jury), is inconsistent with the plain language of Section 136v(a) (regulation of "sale or use . . . in the State"), and Section 136v(b)'s preemption of only those claims involving "labeling or packaging in addition to or different from those required under this subchapter." Nothing in that subchapter governs "labeling or packaging" of pesticides or fungicides in Ecuador. Therefore, petitioner's state law negligent distribution claim was not preempted because it does not impose a regulation different from the "labeling or packaging" requirements of the subchapter.

Thus, even if *Bates v. Dow Agrosciences* should announce a broad preemption rule for FIFRA that might otherwise encompass a domestic negligent distribution claim, the fact that this case involves an exported pesticide and a claim arising in a foreign country distinguishes the issue presented here from that in *Bates v. Dow Agrosciences* and requires a grant of certiorari and review by this Court. This case presents the important but unanswered question of the meaning that should be given to the "in the State" language of Section 136v(a), and to Section 136v(b), which on its face provides for express preemption only for those claims that are based on "labeling or packaging." Review should be granted to review and reverse the rogue decision of the Florida Fourth District Court of Appeal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be held until there is a decision in *Bates v. Dow Agrosciences LLC,* No. 03-388 (pending, to be argued January 10, 2005), and the Court should either grant certiorari, vacate the judgment below and remand in light of the forthcoming decision in *Bates*, or grant certiorari and full review of the related but distinct issues of federal preemption presented by the decision and judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT FILED MARCH 31, 2004

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D01-1642

E.I. DU PONT DE NEMOURS AND COMPANY,

Appellant,

v.

AQUAMAR S.A., EMELORSA-EMPACADORA EL ORO S.A. and INDUSTRIAL Y AGRICOLA 44 S.A.,

Appellees.

Opinion filed March 31, 2004

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; O. Edgar Williams, Jr., Judge; L.T. Case No. 97-20375 (27).

STEVENSON, J.

The appellant, E.I. Du Pont de Nemours and Company ("Du Pont"), manufactures Benlate, a fungicide. Starting in the late 1980's/early 1990's, Benlate was applied to banana farms in Ecuador to prevent the spread of a disease called Black Sigatoka. After nearby shrimp farms, including

Appendix A

Aquamar, S.A.,[1] whose water source is the local rivers, began to experience massive shrimp mortalities, they filed suit against Du Pont. A jury found that Du Pont was negligent in its distribution of Benlate, awarding damages in excess of $12 million dollars. Du Pont appeals, asserting that Aquamar's tort claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, that the trial court made a number of erroneous evidentiary rulings, and that the $12 million verdict includes improper elements of damages. We find merit in Du Pont's preemption argument and reverse.

The Causation & Negligence Theories

In the late 1980's/early 1990's, Black Sigatoka, a disease that affects banana crops, spread to Ecuador. To combat the disease, banana farmers rotated three fungicides: Benlate, manufactured by Du Pont; Tilt, manufactured by Ciba-Geigy; and Calixin, manufactured by BASF. The rotation of the fungicides was designed to prevent the disease from becoming resistant to the chemicals and was recommended by the Fungicide Resistance Action Committee ("FRAC"). Representatives of Du Pont were members of FRAC.

At trial, Aquamar took the position that Benlate is the cause of a disease known as Taura Syndrome and that Taura Syndrome either directly caused the shrimp deaths or exposure to benomyl, the active ingredient in Benlate, had so weakened the shrimp's immune system that they were

1. Initially, two other shrimp farms, Emelorsa-Empacadora el oro S.A. and Industrial Y Agricola 44 S.A., were also plaintiffs. Sometime in 1997, however, Aquamar bought out these farms.

susceptible to the disease. When benomyl comes into contact with water, it breaks down into a compound known as MBC or carbedazim. MBC was found in the dead shrimp. For its part, Du Pont acknowledged that Benlate is toxic to shrimp and that it never tested the effects of benomyl on Pacific White Shrimp, the variety farmed at Aquamar. Du Pont contended, however, that Benlate was not responsible for the shrimp deaths and that Aquamar could not link the MBC found in Aquamar's shrimp to Benlate. Du Pont maintained that other fungicides used in the area, including a chemical known as thiophanate methyl, also broke down into MBC. Ultimately, Du Pont argued that the cause of the shrimp deaths was not a toxin at all, but, rather, a new virus—the Taura Syndrome Virus. Both sides called a litany of experts.

On the issue of Du Pont's negligence, Aquamar pursued three separate theories. First, Aquamar argued that Du Pont had been negligent in failing to adequately test Benlate, eliciting testimony from Du Pont employees that the company never tested the effects of the product on Pacific White Shrimp, had done only limited testing regarding the product's run-off potential, and had performed no testing specific to Ecuador. In a somewhat similar vein, Aquamar also suggested that Du Pont had been negligent in failing to warn the banana farmers of the run-off potential and the product's toxicity to shrimp as the label applied to Benlate exported to Ecuador indicated that the product was toxic to fish, but made no mention of shrimp.

Last, but not least, Aquamar asserted that Du Pont had been negligent in its distribution of Benlate. The last of these theories was not as clearly defined at trial as the others. Based

upon counsel's closing argument, however, it appears the theories underlying the claim were two-fold. First, counsel pointed to Du Pont's failure to warn of or help solve run-off problems in the face of FRAC's recommendation regarding product rotation and Du Pont's knowledge that the product was being aerially applied. On appeal, Aquamar further fleshes out this argument by asserting that Du Pont was negligent in "advising and instructing Ecuadorians that Benlate should be widely applied in combination with the fungicides Tilt and Calixin...." Second, counsel pointed to Du Pont's actions or the lack thereof after it was notified by the Ecuadoran government, in September 1993, of the shrimp deaths and the suspected link to fungicide. The jury resolved only the negligent distribution theory in favor of the plaintiffs. Against this backdrop, we now turn to Du Pont's first point on appeal, wherein it argues that the jury verdict cannot stand because Aquamar's claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y.

Does the Federal Insecticide, Fungicide, and Rodenticide Act preempt Aquamar's state law claim for negligent distribution?

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C.A. §§ 136-136y (1999), provides a comprehensive scheme for pesticide labeling and generally makes it unlawful for any United States manufacturer to sell an unregistered pesticide, stating that "no person in any State may distribute or sell to any person any pesticide that is not

registered under this subchapter."[2] *See* § 136a(a). Registration is an involved process culminated by the EPA Administrator's approval of the product's label and determination that other FIFRA requirements have been satisfied. *See* § 136a(c)(5)(B). The manufacturer must file information including the proposed label, the purpose of the pesticide and "any directions for its use" and, if requested, test descriptions and results. *See* 7 U.S.C.A. § 136a(c)(1)(C)- (F); 40 C.F.R. § 156.10 (2003). The EPA reviews the filing and the label, and determines whether the label information is adequate to protect the public from misleading claims or "unreasonable adverse" environmental effects. *See* 7 U.S.C.A. § 136a(c)(5).

Despite the prohibition against the sale of unregistered pesticides in the United States, pesticides that are intended solely for export need not be "registered." Pursuant to § 136o, a manufacturer in the United States may sell or distribute an unregistered pesticide to a foreign country provided it complies with specified labeling requirements and provides a statement to the foreign country indicating that the product is not registered for use in the United States. 7 U.S.C.A. § 136o(a); 40 C.F.R. § 168.65. A violation of any of FIFRA's requirements subjects the manufacturer to civil penalties imposed by the EPA and to possible criminal penalties. § 136l.

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2. A "person" is "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C.A. § 136(s). A "State" means "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." § 136(aa).

In the face of such comprehensive sale and labeling regulation, Congress included an express preemption clause in FIFRA,[3] prohibiting any "State" from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." § 136v(b). This language has been interpreted as prohibiting "any state common law cause of action that rests on an alleged failure to warn or convey information about a product through its label." *See In re DuPont- Benlate Litig.*, 859 F.Supp. 619, 622 (D.P.R.1994); *ISK Biotech Corp. v. Douberly,* 640 So.2d 85, 88 (Fla. 1st DCA 1994) (holding that "FIFRA preempts all state common law actions that are associated in any way with a claim of inadequate labeling"); *see also Lowe's Home Ctrs., Inc. v. Olin Corp.*, 313 F.3d 1307, 1310 (11th Cir.2002). Here, the trial court concluded that FIFRA and its preemption provision were inapplicable because the plaintiff's claims arose from use of the pesticide in Ecuador. This was error. Although producers of pesticides intended for export are exempted from FIFRA's registration requirements with the EPA, exported pesticides must nevertheless be labeled accurately and include certain information. *See* § 136o(a)(1)-(2). Significantly, FIFRA mandates that a pesticide intended for export may not be "misbranded." *See* §§ 136(p)-(q).

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3. It is well-established that our Constitution's Supremacy Clause gives Congress the power to preempt state law. Preemption can occur in three ways: (1) the federal statute contains express language of preemption, so-called express preemption; (2) the scheme of federal regulation is so pervasive that there is no room for state regulation, known as field preemption; and (3) compliance with federal and state law is impossible, conflict preemption. *See Blinn v. Fla. Dep't of Transp.*, 781 So.2d 1103, 1109 (Fla. 1st DCA 2000).

Appendix A

A pesticide intended for export is misbranded if, among other requirements:

> (G) *the label does not contain a warning or caution statement which may be necessary* and if complied with, together with any requirements imposed under section 136a(d) of this title, is adequate to protect health and the environment;

7 U.S.C.A. § 136(q)(1)(G)(emphasis added).

In addition, pesticides intended for export are subject to section 136(q)(2), which provisions indicate that a pesticide may be "misbranded" based upon the label's failure to include certain information, such as an ingredient statement, use classification, producers information, "poison" and skull and crossbones for highly toxic substances, and a first aid statement. The foregoing requirements adequately demonstrate Congress's intent to regulate the "labeling" of dangerous pesticides produced in the United States, but exported to foreign markets.

Aquamar argues that the requirements of FIFRA were not intended to bar foreign plaintiffs from asserting claims against United States corporations in state courts for damages caused by the use of pesticides abroad. We agree, of course, that Ecuador is not a "State" and FIFRA's preemption provision could not be read to prohibit the country of Ecuador from imposing additional labeling or warning requirements upon pesticide manufacturers. And, under appropriate jurisdictional circumstances, *a foreign plaintiff, relying on foreign law,* could probably assert an inadequate warning or

"labeling" claim in a state court based on injury arising from the use of a United States-manufactured pesticide abroad. In this case, however, the plaintiff elected to proceed in the State of Florida and under Florida law. Consequently, whether the pesticide at issue was registered for use in the United States and then exported, or simply exported without registration for use in the United States, FIFRA governs the product's label and prohibits the State of Florida from imposing any additional or different requirements.

Indeed, as the court noted in *Mortellite v. Novartis Crop Protection, Inc.*, 278 F.Supp.2d 390, 397 (D.N.J.2003) (quoting *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 601 (1991)): "[C]ourts have recognized that FIFRA is more than 'a labeling law,' but is 'a comprehensive regulatory statute.'" Whether the product was registered in the United States and then exported or simply exported without registration for use in the United States, Du Pont was obligated to comply with a host of labeling and administrative requirements imposed by FIFRA relating to the safety of the product and the adequacy of any necessary warnings. Thus, the question of whether the product's label contained adequate and necessary warnings was a matter for administrative determination within the context of federal regulations, not Florida common law.

In *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.1993) (*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521(1992)), the court read FIFRA's preemption provision in section 136v(b) to "'suggest[] no distinction between positive enactments and the common law.'" The court explained that common law actions constituted an

"additional" requirement within the meaning of § 136v(b) where damage awards are a form of state regulation. Thus, the court held that "[t]o the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's 'labeling or packaging' failed to meet a standard 'in addition to or different from' FIFRA requirements, section 136v pre-empts the claims." *Id.* (quoting language from § 136v(b)).

The question, then, becomes whether Aquamar's negligent distribution claim, the only claim upon which it prevailed at trial, is truly nothing more than a disguised labeling claim, as argued by Du Pont. "When a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Etcheverry v. Tri-Ag Serv., Inc.*, 93 Cal.Rptr.2d 36, 48 (2000).

> Where it is not clear whether a claim is preempted, the determination of whether a claim is permissible or preempted depends on "whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label."

Arnold v. Dow Chem. Co., 110 Cal.Rptr.2d 722, 736 Cal. Ct. App. (2001) (quoting *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir.1993)); *see also Dow Agrosciences LLC v. Bates*, 332 F.3d 323, 331 (5th Cir.2003) (holding that farmer's claims were preempted by § 136v(b) "if a judgment

against Dow would induce it to alter its product label"), *petition for cert. filed,* No. 03-388, 72 U.S.L.W. 3184 (U.S. Sept. 9, 2003).

In *Schuver v. E.I. Du Pont de Nemours & Co.,* 546 N.W.2d 610 (Iowa 1996), the Iowa Supreme Court addressed negligence claims remarkably similar to those asserted by Aquamar and concluded that they were preempted by FIFRA. There, an O'Brien County farmer, Raymond Schuver, applied Preview, an herbicide manufactured by Du Pont, to his soybean crop in 1988, 1989, and 1990. Schuver rotated his crop land between soybeans and corn and, in 1989, began to notice problems with his corn crop. An agronomist with the retailer who sold the Preview to Schuver attributed the damage to "residual carryover effect," i.e., the length of time that an application of pesticide might harm subsequently planted crops. *Id.* at 611. Schuver sued the retailer and Du Pont, alleging negligence in manufacturing and sale of the product to Schuver (count I); strict liability in that the product was defective and unreasonably dangerous (count II); and breach of an implied warranty of merchantability (count III). In count IV, Schuver alleged that the retailer made and breached an express warranty that Preview was the appropriate product for use on the Schuver farm. *See id.* at 611-12. With respect to the claims against Du Pont, the district court found that they were preempted by FIFRA. Schuver appealed.

On appeal, Schuver conceded that the implied warranty claims were preempted, but steadfastly argued that the negligence and strict liability claims were not preempted because they were not labeling claims. According to

Schuver's counsel, Du Pont's negligence was not in any shortcoming of the label, but rather in (1) marketing Preview in O'Brien County when Du Pont either knew or should have known that soil in O'Brien County was susceptible to residual carryover; (2) failing to withdraw Preview from sale in O'Brien County after learning of crop damage caused by Preview in that county; (3) failing to test Preview in O'Brien County soil types before selling the product in O'Brien County; and (4) failing to timely notify O'Brien County farmers of Preview's propensity for residual carryover. *See* 546 N.W.2d at 613. The Iowa Supreme Court concluded that all of this was "merely another way of arguing that Du Pont's labels should have warned against using Preview in O'Brien County" and, thus, the district court had correctly concluded that the claims were preempted by FIFRA. *Id.* at 614; *see also Hue v. Farmboy Spray Co.*, 896 P.2d 682 (1995) (en banc).

By substituting "Ecuador" for "O'Brien County," "Benlate" for "Preview," and "run-off potential" for "residual carryover," the similarity between *Schuver* and the instant case is apparent. Moreover, it is clear that, to avoid liability for Aquamar's claimed negligence, the remedy is for Du Pont to specifically warn of run-off potential and toxicity to shrimp. Consequently, we find that Aquamar's negligent distribution claim is, at its heart, a claim challenging the product's label and the failure to warn. As such, FIFRA preempts the state law claim.

Lastly, we reject Aquamar's argument that this case amounts to more than a failure to warn claim since Du Pont, through its role in the Fungicide Resistance Action

Committee (FRAC), allegedly specifically advised that the banana farmers needed to rotate the fungicides to avoid fungicide resistance. In our view, Aquamar's claim in this regard is akin to an assertion that a manufacturer's point-of-sale advertisement or information material was inadequate to warn of the dangers of a product. In *Papas,* the Eleventh Circuit stated:

> [A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends.[4]

985 F.2d at 519. Additionally, Aquamar did not plead a cause of action for negligent misrepresentation or fraud with regard to these "off-label" statements.

In conclusion, our decision renders the additional issues raised on appeal by Du Pont moot. Accordingly, we reverse the jury verdict and remand for entry of judgment in favor of the defendant below, Du Pont.

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4. *Compare Lowe v. Sporicidin, Int'l,* 47 F.3d 124, 130 (4th Cir.1995) (suggesting that claims against manufacturers for advertisements that "substantially differ" from the label may be actionable).

REVERSED and REMANDED.

MAY, J., and CHAVIES, MICHAEL B., Associate Judge, concur

APPENDIX B — ORDER OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DENYING PETITION FOR REHEARING DATED AUGUST 30, 2004

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D01-1642
L.T. No. 97-20375 27

E.I. DU PONT DE NEMOURS AND COMPANY

Appellant/Petitioner(s),

v.

AQUAMAR S.A.,
EMELORSA-EMPACADORA, ETC., ET AL.

Appellee/Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed April 29, 2004, for rehearing and rehearing *en banc* is hereby denied; further,

ORDERED that appellee's motion filed July 16, 2004, to hold case (and decision on motion for rehearing) in abeyance pending a decision in *Bates v. Dow Agrosciences* is hereby denied.

Appendix B

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER
Fourth District Court of Appeal